Supreme Court, U.S.
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No. 94-196

IN THE

Supreme Court Of The United States

October Term, 1994

Grove North America, Division of
Kidde Industries, Inc., a corporation,
Petitioner,

v.

Richard Douglas Lowe and Honorable Roger Monroe,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

RESPONDENT LOWE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the federal due process claim was adequately presented below when Petitioner stated in the state courts its ground for recusal to be Canon 3C(1) of the Alabama Canons of Judicial Ethics, not federal due process.

II. Whether a substantial federal due process issue is presented concerning a judge's recusal when an elected state trial judge received only $13,000 in total campaign contributions (for two separate campaigns) and a total of $26,000 in referral fees from Respondent's law firm (where the referral contracts were executed *before* the practicing lawyer became a judge, but the cases did not settle until after he took the bench).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

I. THE FEDERAL DUE PROCESS ISSUE WAS NOT PRESENTED TO THE TRIAL COURT OR TO THE SUPREME COURT OF ALABAMA 5

II. THE RECUSAL ISSUE PRESENTED DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: *Page*

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 78, 108 S. Ct. 1645, 1650 (1988) 6

Banks v. Herbin, 500 So.2d 1027, 1030 (Ala. 1986) 7

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987) 7

Brown v. Brown, 11 Va. App. 231, 397 S.E.2d 545 (Va. App. 1990) 10

Clark v. Jeter, 486 U.S. 456, 458, 108 S. Ct. 1910, 1913 (1988) 6

Collins v. Dixie Transport, Inc., 543 So.2d 160, 166 (Miss. 1989) 2

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337 (1968) 12

Exxon Corp. v. Eagerton, 462 U.S. 176, 103 S. Ct. 2296, 2300 n. 3 (1983) 7

Fiftieth District Court Judge, In re, 193 Mich. App. 209, 483 N.W.2d 676 (Mich. App. 1992) 11

Haralson v. Haralson, 483 So.2d 378, 380 (Miss. 1986) 2

Heath v. Alabama, 474 U.S. 82, 87, 106 S. Ct. 433, 437 (1985) 6

Illinois v. Gates, 462 U.S. 213, 221-22, 103 S. Ct. 2317, 2323 (1983) 6

Kirkland v. Kirkland, 281 Ala. 42, 47, 198 So.2d 771, 777 (1967) 7

TABLE OF AUTHORITIES (continued)

Cases: *Page*

Murchison, In re, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) 1, 2, 3, 4, 8, 12

Offfutt v. United States, 340 U.S. 11, 14 (1955) 1, 2

Potashnick v. Port City Const. Co., 609 F.2d 1101, 1112 (5th Cir. 1980) 2, 11

Prudential Federal Savings & Loan Association v. Flanigan, 478 U.S. 1311, 107 S. Ct. 38 (1986) 7

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S. Ct. 614 (1955) 9

Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. Ct. App. 1983) 10

Smith v. State, 212 Miss. 497, 54 So.2d 739, 741 (Miss. 1951) 3

Stover v. Alabama Farm Bureau Ins. Co., 467 So.2d 251, 253 (Ala. 1985) 7

Taylor v. Illinois, 484 U.S. 400, 406, 108 S. Ct. 646, 651 n. 9 (1988) 6

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 1893-94 (1981) 6

West Town Plaza Associates, Ltd. v. Wal-Mart Stores, Inc., 619 So.2d 1290, 1294 (Ala. 1993) 7

Whisenant v. State, 555 So.2d 219, 223 (Ala. Cr. App. 1988) 2

Yee v. City of Escondido, 112 S. Ct. 1522, 1531 (1992) 6

TABLE OF AUTHORITIES (continued)

Constitution, Statutes and Rules: *Page*

28 U.S.C. § 1257 5

28 U.S.C. § 1257(a) 5

Canon 3C(1) of the Alabama Canons of Judicial Ethics 1, 2, 4

Other Authorities:

12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶ 510.01, p. 8-56 (2d ed. 1993) 5, 9

16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Eugene Gressman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 702-03 (1977) 5

STATEMENT OF THE CASE

A. Facts Material to the Question Presented

Respondent Lowe has no disagreement with the facts as stated by Petitioner.

B. How the Federal Question was Raised

Respondent Lowe, however, asserts that the federal due process issue was *not* presented to the trial court or to the Alabama Supreme Court (until Grove's application for rehearing, which procedurally is too late).

At p. 4 of the Petition, Grove asserts that it presented this issue to the trial court because p. 3 of its trial court brief cited *Murchison* and *Offutt*. Here are the pertinent portions of "Defendant Grove North America's Memorandum Brief in Support of Motion for Recusal," served in the trial court on October 6, 1993:

> **ARGUMENT**
>
> **A. Grounds for Recusal**
>
> Recusal is required under Canon 3 C(1) of the Alabama Canons of Judicial Ethics when the facts are such that it is reasonable for a party, for members of the public, or for counsel to question the impartiality of a trial judge. Recusal is required when accusations are supported by proof of facts showing a conflict. [citations to Alabama cases omitted]. The test under that canon is "'[w]ould a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis to question the judge's impartiality?'" [Alabama citations omitted].
>
> The reasonable person/appearance of impropriety test, as articulated in Canon 3 C(1), in the words of the Supreme Court of the United

States, may "[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). Canon 1 of the Code of Judicial Ethics states, "[a]n independent and honorable judiciary is indispensable to justice in our society." The stature of the judiciary requires avoiding *all appearance* of impropriety, even requiring the resolution of all reasonable doubt *in favor of recusal.* [Alabama citation omitted].

. . .

The question of disqualification is not whether a judge actually *is* biased, for a judge must be disqualified, "without finding fault . . . so that even the appearance of impropriety can be avoided." *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (Miss. 1989) (*emphasis in original*) (*quoting Haralson v. Haralson*, 483 So.2d 378, 380 (Miss. 1986)). This principal derives from the ethical proscription which governs the judiciary: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3 C(1), Alabama Canons of Judicial Ethics. *See also Whisenant v. State*, 555 So.2d 219, 223 (Ala. Cr. App. 1988). "An Alabama judge must exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case." *Potashnick v. Port City Const. Co.*, 609 F.2d. 1101, 1112 (5th Cir. 1980). Therefore, even when this court may be sure that he will strive to be absolutely impartial, disqualification is rightly required so that "justice [will] satisfy the appearance of justice." *Murchison, supra*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955), *quoting Offutt v. United States*,

340 U.S. 11, 14 (1955) (*emphasis supplied*); *Smith v. State*, 212 Miss. 497, 54 So.2d 739, 741 (Miss. 1951).

. . .

B. The Need for Further Disclosure

The duty rests upon the trial judge to act *sua sponte* on any hint that disqualification may be appropriate.

. . .

In the event that this Court decides that recusal is not supported by the facts and arguments submitted herein, defendant Grove North America respectfully suggests that this Court should consider whether any potential bases for recusal exist which have not been raised in defendant's Motion for Recusal. If they do, defendant requests that they be made known to counsel for all parties, in open court, so that the parties may properly evaluate whether further motions to unseal financial disclosure statements and arguments on disqualification would be appropriate.

CONCLUSION

WHEREFORE, defendant Grove North America, Division of Kidde Industries, Inc., moves that the Hon. Roger Monroe issue an order recusing himself from further participation in this matter, or, alternatively, disclose any potential bases for disqualification in this case based on past client referrals to plaintiff's counsel or other financial conflicts of interest.

Similarly, at p. 5 of its Petition, Grove asserts that the federal due process issue was raised in the Alabama Supreme Court because it cited *Murchison* in its petition and brief. Grove's Petition for Writ of Mandamus, served

on the Alabama Supreme Court on February 11, 1994, concluded thusly:

> **GROUNDS FOR ISSUANCE OF THE WRIT**
>
> Judge Monroe's impartiality might be reasonably questioned in view of the facts set forth above. Pursuant to the Alabama Canons of Judicial Ethics, specifically Canon 3 C(1), and the authorities cited in Petitioner's brief filed herewith, the writ should issue along with the order directing disqualification and recusal.

Grove's Alabama Supreme Court brief of February 11, 1994, is virtually word-for-word a reprint of its trial court brief. The Alabama petition and brief make absolutely no reference to "due process," and do not assert any reliance on the federal constitution as a reason or ground for granting its petition for writ of mandamus to require the recusal of Judge Monroe. The specific ground for relief is stated (p. 2 of Feb. 11, 1994, brief) as: "Recusal under Canon 3 C(1)," not federal due process. *Murchison* is cited (p. 3 of Feb. 11, 1994), exactly as quoted above from Grove's trial court brief.

Grove's petition was denied without opinion by order of the Alabama Supreme Court, dated March 22, 1994. On April 5, 1994, Grove filed a "Motion for Rehearing," and a brief in support thereof. For the very first time in this case, a federal ground was asserted. Page 3, par. 5, of Grove's Motion for Rehearing asserts:

> Judge Monroe's participation in this case violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment . . .

The subtitle on p. 3 of the accompanying brief asserts, for the first time:

> c. *The Respondent Trial Judge's Ongoing Financial Relationship with the Plaintiff's Counsel Violates Petitioner's Rights to Due Process.*

The Alabama Supreme Court denied the Motion for Rehearing without opinion on April 18, 1994.

C. The Decision Below is Final

Respondent Lowe agrees that the action of the Alabama Supreme Court is final for purposes of 28 U.S.C. § 1257 review.

REASONS FOR DENYING THE PETITION

I.

THE FEDERAL DUE PROCESS ISSUE WAS NOT PRESENTED TO THE TRIAL COURT OR TO THE SUPREME COURT OF ALABAMA

The phrases "drawn in question" and "specially set up or claimed under the constitution," in 28 U.S.C. § 1257(a) "mean that the federal question must have been duly raised in the state court." 12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶ 510.01, p. 8-56 (2d ed. 1993). "The purposes of the requirement that a federal question be raised in the state courts plainly are not satisfied if one question is presented to the state courts and a different question is presented to the Supreme Court. . . . Similarly, an argument that was initially presented to the state court in terms of state law cannot be shifted tardily into a constitutional argument . . . [I]t is not sufficient to show that the federal question advanced in the Supreme Court merely has some connection to the issue advanced in the state courts." 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Eugene Gressman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 702-03 (1977).

"In reviewing the judgments of state courts . . . the Court has, with very rare exceptions, refused to consider

petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992). "[I]t is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 458, 108 S. Ct. 1910, 1913 (1988). There is "a weighty presumption against review" of claims not pressed below. *Heath v. Alabama*, 474 U.S. 82, 87, 106 S. Ct. 433, 437 (1985). The reasons for this strict rule include: (1) presentation of the federal issue to the state court helps ensure that an adequate record is made; (2) it gives due regard to appropriate relations between the Supreme Court and state courts; and (3) it gives the state court a chance to rely on state grounds. *Illinois v. Gates*, 462 U.S. 213, 221-22, 103 S. Ct. 2317, 2323 (1983). Also, a reasoned state court opinion on the issue may obviate the need for plenary consideration by the Supreme Court. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 1893-94 (1981).

"A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim . . . ." *Taylor v. Illinois*, 484 U.S. 400, 406, 108 S. Ct. 646, 651 n. 9 (1988). At minimum, "there should be no doubt from the record that a claim under a federal statute on the Federal Constitution was presented in the state courts and that those courts were apprised of the nature of substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 1894 (1981). "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78, 108 S. Ct. 1645, 1650 (1988).

Alabama appellate courts will not consider issues raised for the first time on appeal. See, as one of many ex-

amples, *West Town Plaza Associates, Ltd. v. Wal-Mart Stores, Inc.*, 619 So.2d 1290, 1294 (Ala. 1993). This Court recognized this principle in the Alabama case of *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S. Ct. 2296, 2300 n. 3 (1983), where it was said this Court had "no jurisdiction" to consider an argument made for the first time to the Alabama Supreme Court. "The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Id.* Also, when the state supreme court does not discuss the federal issue, it is assumed that the omission was because the issue was not procedurally raised in a timely or proper manner. The aggrieved party has the burden of showing the contrary. *Id.*

More specifically, *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251, 253 (Ala. 1985), notes that: "New supporting arguments presented for the first time on rehearing generally will not be considered." "An application for rehearing on [a] ground not argued or suggested until after our judgment was rendered cannot be now considered." *Banks v. Herbin*, 500 So.2d 1027, 1030 (Ala. 1986), (*quoting Kirkland v. Kirkland*, 281 Ala. 42, 47, 198 So.2d 771, 777 (1967)). *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987), refused to review a constitutional question which was first clearly raised in the state supreme court application for rehearing. The state court denied the application without opinion [like in this case], and this Court assumed that action was based upon the failure to timely present the issue. *See also Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311, 107 S. Ct. 38 (1986) (rehearing too late). "The long-established general rule is that an initial attempt to raise a federal question after judgment by the highest court, upon a petition for rehearing, comes too late, unless that court actually entertains the question and decides it." Moore's, *supra*, at p. 8-61.

In this case, "due process" was never even mentioned to the trial court, much less specifically "pressed" as a ground for relief. The specific ground relied upon by Grove was Canon 3 C(1) of the Alabama Canon of Judicial Ethics. The same limited argument was presented in Grove's petition for writ of mandamus filed in the Alabama Supreme Court. "Due process" was not mentioned until Grove's application for rehearing. Grove's only argument for having presented the question below is that its brief cited *Murchison*. The full "*Murchison*" citations, from Grove's briefs, read:

> The reasonable person/appearance of impropriety test, as articulated in Canon 3 C(1), in the words of the Supreme Court of the United States, may "[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L Ed. 942 (1955). Canon 1 of the Code of Judicial Ethics states, "[a]n independent and honorable judiciary is indispensable to justice in our society." The stature of the judiciary requires avoiding *all appearance* of impropriety, even requiring the resolution of all reasonable doubt *in favor of recusal.*
>
> . . .
>
> Therefore, even when this court may be sure that he will strive to be absolutely impartial, disqualification is rightly required so that "justice [will] satisfy the appearance of justice." *Murchison, supra*, 349 U.S. 133, 136 . . .

This vague citation, squeezed between the two Alabama rules being principally relied upon, is totally insufficient to raise any issue regarding any federal due process ground for Judge Monroe's recusal. The due process argument was *NOT* made by Grove until its application

for rehearing to the Alabama Supreme Court. Thus, the federal issue presented by Grove in its petition to this Court was *NOT* adequately presented to the state courts.

II.

THE RECUSAL ISSUE PRESENTED DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

"To afford the basis for review, the federal question must be substantial." Moore's, *supra*, at ¶ 512.01, p. 8-73. Questions regarding the methods of selection of state judges and the financing of judicial elections are important societal issues, but they were not adequately raised in this record. Also, a contribution of $8,000 to a trial judge's campaign, and a $5,000 contribution to his later appellate court campaign simply does not raise a *substantial* issue about whether due process requires recusal. Furthermore, a sitting judge receiving a previously-agreed percentage referral fee ($26,000 total) in three cases he referred *before* becoming a judge also fails to raise any federal constitutional issue, substantial or otherwise. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . ." Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

There is no "split of authority" in this country on the issue of campaign contributions to judges. Page 15 of Grove's petition asserts that one court has ruled that contributions require recusal. It is amazing that Grove would cite *Brown v. Brown*, 11 Va. App. 231, 397 S.E.2d 545 (Va. App. 1990), because that case involved a lawyer in a pending case giving a political contribution to a "quasi-judicial officer" for a *non-judicial* political race. At 547-48, the Virginia Court specifically limited its holding:

> We reject as unpersuasive the analogy drawn to cases involving contributions made to judges in systems in which judges are popularly elected. Our own judicial system is not one which requires candidates for the bench to stand for election. Thus, we are not required to balance the influential aspects of contributions against the practicalities of conducting an election and then administering a judicial system following a judicial election campaign. *Compare Rocha v. Ahmad*, 662 S.W.2d 77,78 (Tex. Ct. App 1983). . . .

Rocha, at 78, states:

> It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races . . . If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

Even if this Court is interested in the issue of contributions to elected state judges, this record is too vague and

skimpy to support this Court's plenary review of this issue. The "record" in this case is primarily two or three pages of an affidavit and financial statement of the $13,000 in contributions and $26,000 in total referral fees. There are no facts in evidence about judicial races in Alabama, total and average amounts spent, where specific judges' contributions come from, etc. There is no demonstration of any "problem" in Alabama. The two separate contributions (totaling only $13,000) by one firm (which happens to be the largest plaintiff-oriented law firm in Alabama) to a judge for two separate judicial races (one a state-wide appellate court race) simply fail to raise a significant federal issue. [This really is a political question. If the people of Alabama want to switch to appointed judges, they can elect legislators who will propose such a constitutional amendment, then vote at the constitutional referendum.]

As to the referral fees, there is also a too-slim record in this particular case. (For example, for all this record shows, solo practitioner Roger Monroe might have had 90 files in his office when he was elected to the bench, and he may have referred three cases each to 30 separate law firms.) And, there is also a lack of any substantial disagreement among lower courts on the issue. Grove has not cited a single case wherein a court declared that recusal was required when a sitting judge received a referral fee from a case he referred *before* becoming a judge. There is not even an analogous case that relies on federal due process grounds.

Grove admits that *Potashnick* (discussed at pp. 12-13 of Petition) was not decided on due process grounds. *In re Fiftieth District Court Judge*, 193 Mich. App. 209, 483 N.W.2d 676 (Mich. App. 1992) (p. 12 of Petition), also is not a due process case, but is based on MCR 2.003. In the Michigan case, the judge jointly owned the land and the law firm's building. The firm paid all the real estate

taxes, and paid off a mortgage on which the judge was jointly liable. Such facts are far afield from Judge Monroe's receipt of settlement funds from pre-judgeship referrals.

The case that Grove relies upon to have raised its due process issue, *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955), merely held that the same human being could not serve as both the "one-man judge-grand jury" and the trial judge. "[N]o man is permitted to try cases where he has an interest in the outcome." 349 U.S. at 136, 75 S. Ct. at 625. In the case at bar, Judge Monroe has no financial stake or interest in the outcome of *Lowe v. Grove.*

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337 (1968) (pp. 9-11 of Petition), was based primarily on the Canons of Judicial Ethics and the Rules of the American Arbitration Association, not due process. The facts are easily distinguishable: The tainted arbitrator was an engineering consultant in Puerto Rico, and the contractor sued was "one of his regular customers in this business." 393 U.S. at 146, 89 S. Ct. at 338. "[T]he relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit." *Id.*

Besides having no supporting legal authority, Grove has failed to demonstrate any actual bias *in this case.* In this case, a lawyer referred a case and agreed to a percentage of the contingency fee as a referral fee (ethically permissible in Alabama and in many other states) – then the lawyer became a judge before the case terminated. In the referred case, the law firm has every incentive to maximize the recovery; and, as a matter of mathematics, the judge's referral fee increases as the total recovery increases. The judge does nothing: he has no control over the referred case, and there is nothing he can do in the case before him (*Lowe v. Grove*) which can in any way increase his share of the recovery in the referred case. In

other words, there is no "proximate cause" connection between *Lowe v. Grove* and the cases referred to the Hare firm before Judge Monroe took the bench. The Hare firm did, and would have done, its utmost to maximize the recovery in the referred cases, no matter what Judge Monroe did or did not do in the course of *Lowe v. Grove.* THIS PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS!

CONCLUSION

The petition for writ of certiorari is due to be denied.

Respectfully submitted this 2nd day of September, 1994.

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